Supreme Court of the United States

OCTOBER TERM, 1955

No. 23

HARRY SLOCHOWER,
Appellant,

vs.

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S SUPPLEMENTAL BRIEF

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—against—

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

APPELLEE'S SUPPLEMENTAL BRIEF

(a)

The appellant's reply brief (pp. 6-7) characterizes as unworthy the position taken by the appellee in its main brief that under the circumstances in this case certain inferences flow from the invoking of the privilege against self-incrimination by the appellant. He further asserts that it is the appellee's desire to eliminate, as a practical matter, the Fifth Amendment from the Bill of Rights.

Neither the Corporation Counsel of the City of New York nor the Board of Higher Education have any desire to eliminate the Fifth Amendment from the United States Constitution. The appellee does contend that public employees have obligations as well as rights. The right to be selected by competition and the right to tenure carry with them the obligation of being open and frank with one's employer as to matters relating to official conduct. We believe further that the Legislature which has given these rights to the appellant may expect the employee to

cooperate with a United States Senate Committee making inquiries which relate to the employee's official conduct.

When the employee cloaks himself in the privilege against self-incrimination and refuses to make full disclosure of what he knows he thereby destroys the confidence which an employer should have in an employee. This is certainly true in private employment and should be no less true in public employment, especially in the field of teaching where the highest standards of conduct are applicable.

(b)

The appellant's reply brief attempts to demonstrate that the New York State appellate courts considered the question of whether New York City Charter § 903 as applied to this petitioner constituted a violation of (1) the rights guaranteed him under the Fifth Amendment of the United States Constitution; (2) that portion of the Fourteenth Amendment which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"; (3) that portion of Article VI of the United States Constitution which provides "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land".

Despite the appellant's present claim he does not, and indeed cannot, make a forthright denial of the statement in our main brief (pp. 8-9) that "at no time in any of the state courts was any reference to the Fifth Amendment made by petitioner". Instead, he attempts to infer to this Court that the question was argued by stating "The Appellee's statements are at variance with the opinion of Judge DESMOND in the Court below. As Judge DESMOND noted, the question was argued by appellant and also by the appellee. 'All sides concede', he wrote, 'that, aside from

the supposed applicability of Section 903, the teachers could not be deprived of their positions for exercising their Fifth Amendment right (See *Matter of Grae*, 282 N. Y. 428, 434)". (Appellant's Reply Brief, p. 2.)

The fact is that neither side argued the question of a conflict between the rights given under the Fifth Amendment and § 903. An examination of the appellant's brief to the Court of Appeals reveals no such argument (for the convenience of the Court a copy of his entire brief has been annexed as Appendix A to this supplemental brief). When Judge DESMOND in his dissenting opinion made the statement quoted above he was simply asserting his opinion that, upon the authority of the *Grae* case, in the absence of § 903 no teacher could be automatically dismissed for invoking the Fifth Amendment. In referring to the Fifth Amendment, Judge DESMOND did not pass upon or even refer to any possible conflict with § 903. This is emphasized by the fact that Judge DESMOND did not distinguish between the privilege against self-incrimination as guaranteed under the Fifth Amendment and the similar privilege granted by Article I, § 6, of the New York State Constitution, since the latter privilege was the one referred to in the *Grae* case.

The statement of Judge DESMOND relied on by the appellant appears in the dissenting opinion of the New York Court of Appeals in *Matter of Dauiman* v. *Board of Education*, 306 N. Y. 532, 545. The appellant was one of the petitioners in the *Dauiman* case. The appeal taken to this Court by the other petitioners in the *Dauiman* case was dismissed by this Court for want of a substantial federal question after the New York Court of Appeals denied a motion to amend the remittitur so as to frame a federal question as to those petitioners (Record, 67-68, 307 N. Y. 806 (1954)). If the appellant were correct in his assertion that the Court of Appeals had considered a conflict between §903 and his federal constitutional

rights under the Fifth Amendment it necessarily would follow that the same question was considered as to the other petitioners in the *Daniman* case. The basis on which the Court of Appeals framed Federal questions for the appellant and not for the other petitioners in the *Daniman* case is discussed *infra* at p. 4.

The appellant further contends that the conflict between 903 and the Fifth Amendment is properly before this Court because "it is clear that the question was considered by the court below (R. 50, 56, 61), and a decision of the issue was necessarily involved in the case." (Appellant's Reply Brief, p. 3)

Page 50 of the record, referred to by the appellant, quotes a portion of the majority decision of the Appellate Division. Presumably the appellant relies on the statement therein that "The charter provision does not * * * abridge the constitutional privilege against self incrimination (*Cantéline* v. *McClellan*, 282 N. Y. 166; *McAuliffe* v. *Mayor of New Bedford*, 155 Mass., 216)." This statement was made to dispose of the appellant's argument in Point II of his Appellate Division brief (p. 18) in which he contended "Section 903 of the New York City Charter is an unconstitutional abridgement of rights guaranteed by Article I, Section 6 of the New York State Constitution. * * *"

An examination of the appellant's brief to the Appellate Division (copy of which is annexed hereto as Appendix B) reveals that his entire argument was confined to non-federal questions and at no point in his brief did he mention any federal question. This is further borne out by a reference to page 29 of the Appellant's Court of Appeals brief (Appendix A), where it is clear from the appellant's discussion of the prevailing opinion of the Appellate Division that he treats it as referring to the New York State Constitution and not the United States Constitution.

The appellant also refers to page 56 of the record, which quotes from the opinion of the Court of Appeals as follows: "the Charter provisions do not abridge the constitutional privilege against self incrimination". This is merely a recitation by the Court of Appeals of the holding of the majority in the Appellate Division which has been discussed above. Record p. 61, also referred to by appellant, contains the statement by Judge DESMOND already discussed herein *supra*, pp. 2-3.

(c)

The only reference to federal constitutional questions by the appellant in the New York State appellate courts appears at pp. 20-22 of the appellant's brief in the Court of Appeals. It was there urged that Slochower was deprived of a property right without due process of law in violation of Article I, §10, and the Fourteenth Amendment of the United States Constitution and Article I, §6 of the New York State Constitution. The appellant failed completely to present the question to the New York appellate courts of a conflict between his rights under the Fifth Amendment and §903 of the Charter. His argument was confined largely to the contention that he "had acquired certain rights in connection with his position including tenure and the right to a fair trial of any accusation against him."

The Court of Appeals disposed of this argument by stating (R 55-56):

> "There is no conflict between section 903 of the Charter and equally valid though differing procedures under the Feinberg Law (L. 1949, ch. 360) and under sections 2554, 2573 and 6206 of the Education Law which guarantee to teachers the right to hold their respective positions during good behavior and efficient and competent service and not to be removed

except for cause after a hearing by the affirmative vote of a majority of the board. Section 903 of the Charter, the Feinberg Law and sections 2554, 2573 and 6206 of the Education Law are legislative enactments of equal dignity. The sections in the Education Law govern the removal of teachers for cause generally by the board [fol. 247] of education and not by the city, whereas the Charter section declares that there shall be a vacatur of office or employment for a particular cause. It merely imposes a condition upon public employment. The legislative acts are to be read in harmony and it is not within our judicial competence to decide for the Legislature, the board of education or the City of New York which shall be used."

(d)

The appellant cites *Braniff Airways Inc.* v. *Nebraska State Board*, 347 U. S. 590 (1954) in support of his position. In that case the petitioner argued that a Nebraska state tax on its property violated the Commerce Clause of the Constitution because its property had not attained a taxable situs in Nebraska. This Court ruled (p. 599) that the basic question in the case, i. e. whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax, was one of due process. However this Court took jurisdiction because "the appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issues sufficiently presented."

In the *Braniff* case, the Court referred to *N. Y. ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63 (1928) for the rule stated at p. 67 therein, that "No particular form of words

or phrases is essential, but only that the claim of invalidity and *the ground therefor* be brought to the attention of the State Court with fair precision and in due time: And if the record as a whole shows either expressly or by clear intendment that this was done the claim is to be regarded as having been adequately presented." (Emphasis supplied.)

We submit that it cannot be here validly urged that the Court of Appeals had fairly presented to it the contention that § 903 abridged the rights given under the Fifth Amendment and thereby violated that portion of the Fourteenth Amendment which provides that no state shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States. For the entire constitutional argument of the appellant was confined to the claim that his dismissal violated due process because he had no trial; that the sub-committee had no power to make an inquiry into official conduct; and that the Feinberg Law had been improperly given retroactive effect.

New York, October 21, 1955.

Respectfully submitted,

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APPENDIX A

To be argued by
EPHRAIM LONDON.

Court of Appeals

OF THE STATE OF NEW YORK.

IN THE MATTER

of

The Application of VERA SHLAKMAN, BERNARD F. RIESS, HARRY SLOCHOWER, SARAH R. RIEDMAN, HENRIETTA A. FRIEDMAN and MELBA PHILLIPS,

Petitioners-Appellants,

For an Order pursuant to Article 78 of the Civil Practice Act

against

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Respondent.

BRIEF FOR APPELLANT HARRY SLOCHOWER.

Statement.

The Appellant HARRY SLOCHOWER was an associate professor at Brooklyn College. The Respondent, The Board of Higher Education of the City of New York (hereinafter referred to as "the Board") governs Brooklyn College and other public colleges of the New York City public school system (New York Education Law 6201). Professor SLOCHOWER was discharged by the Board in October, 1952. He is seeking by this proceeding to be reinstated.

on the grounds that his dismissal was wrongful and improper. The court of first instance, the Special Term of the Supreme Court, Kings County, dismissed the petition (25-29).* The Appellate Division, Second Department, affirmed the order of Special Term, by a divided court, Presiding Justice NOLAN and Mr. Justice WENZEL dissenting (711-723). This appeal is taken from the order of the Appellate Division.

The opinion of the court at Special Term is reported at 202 Misc. 915, and the opinions of the Appellate Division are reported at 282 App. Div. 717, 718.

Facts.

The Appellant HARRY SLOCHOWER was an Associate Professor of Literature and of German (399, 527). On September 24, 1952, he testified before a sub-committee of the U. S. Senate appointed to investigation the administration of the Internal Security Laws (383). At the outset of the hearings, the sub-committee chairman indicated that the hearings did not relate to the state or local administration of public education (45-46), and thereafter assured counsel that the inquiry did not relate to the government or affairs of the city or the official conduct of any city employee (47, 83).

The sub-committee did not question Dr. SLOCHOWER about his loyalty to the Government of the United States or about his qualifications or his work or conduct as a teacher. He was not asked if he was a member of any organization that he knew to be subversive. The Com-

* Unless otherwise indicated, numbers in parentheses refer to corresponding folios in the Papers on Appeal.

mittee was interested chiefly in learning whether Professor SLOCHOWER was a member of the Communist Party during the years 1940-1941 (525-569).

It is worthy of note that, although the sub-committee asked the other teachers, instructors and professors involved in this proceeding about present membership in the Communist Party (93, 102, 103, 121, 122, 131), it failed to ask that question of Dr. SLOCHOWER. The Committee limited its interrogation with respect to Dr. SLOCHOWER's Communist affiliation to the period from 1940-1941 (529-530, 532, 536, 539, 564). Indeed, Dr. SLOCHOWER stated voluntarily,

> "I am not a member of the Communist Party." (536)

and stated further,

> "within my field I have expressed myself in many ways which directly and by implication are counter* to some doctrines held by many Communists. * * * I say that in my field, I could point to a number of things I differ if not am opposed to positions held on these questions. * * * by many Communists" (548).

As indicated by the following colloquy the subcommittee chairman was fully aware that Dr. SLOCHOWER was willing to answer all questions relating to his political affiliations and activities after 1941 (545):

> "Senator Ferguson: And outside of that period you are perfectly willing to answer the questions?
>
> "Mr. Slochower: Anything you want, sir.
>
> "Senator Ferguson: I understand that."

---

* Mistakenly reported as "accounted." The error is apparent from the context of the following answer.

But the committee apparently was not interested in pursuing that line of inquiry.

Professor SLOCHOWER refused to state whether or not he had been a member of the Communist Party in the years 1940 or 1941. He refused on the ground that his answer might tend to incriminate him (538-539). He added, "I am not implying I am guilty. I understand that the Fifth Amendment has been put into the Constitution for the purpose of protecting the innocent" (539).

On October 6th, Dr. SLOCHOWER was summarily dismissed from his position as a college professor (399). He was dismissed without notice or hearing, though he had been a college teacher for twenty-seven years (378) and had tenure by statute, Education Law §6206. The only reason given for his discharge was that he had refused to answer the questions referred to (389-395). It was not claimed that he had been guilty of any misconduct in any classroom, or that his work was in any way unsatisfactory. Indeed, the contrary was true, for Professor SLOCHOWER is widely known as a scholar, lecturer, author and literary critic, and has received the Bollingen Award, and a Guggenheim Fellowship.

Professor SLOCHOWER's summary dismissal was held to be pursuant to §903 of the New York City Charter (the text of which is appended) which provides for the termination of the employment of a City employee who refuses to testify relating to the "property, government or affairs of the city . . . or official conduct of any officer or employee of the city . . . on the ground that his answer would tend to incriminate him . . ." The Respondent determined that the interrogation by the Senate subcommittee related to such matters despite the repeated assertion of the subcommittee chairman that it did not.

Appendix A

Argument.

Dr. SLOCHOWER had tenure of office within the meaning of Education Law §6206. He could not be dismissed except for cause and only after due notice and an opportunity to defend himself at a hearing. Education Law §6206(10). The Board contends that charges, notice and hearing were unnecessary. It claims that when Charter Section 903 is applicable, all safeguards, and the statutory rules and regulations designed to protect college employees against discrimination and unlawful dismissal, are automatically abrogated. The Board, we believe, concedes that, if Charter Section 903 is inapplicable, the Appellant was wrongfully discharged, for he could not, independently of the statute, have been punished for exercising his constitutional right. *Matter of Grae*, 282 N. Y. 428, 434.

The Appellant SLOCHOWER submits:

(In Point I) City Charter Section 903 is not applicable. By its terms, the section is operative only if an employee refuses to answer questions "regarding the property, government or affairs of the city . . . or regarding the . . . official conduct of any officer or employee of the city . . ." An inquiry with respect to membership in the Communist Party in 1940 or 1941 has nothing whatever to do with the "property, government or affairs of the city" or a college professor's "official conduct."

(In Point II) Section 903 as applied, deprived Appellant of property rights without due process of law in violation of the United States Constitution and the New York State Constitution.

(In Point III) Section 903 as interpreted by the court below is an unconstitutional abridgment of the right

against self-incrimination. The section as applied and interpreted is void and cannot be held to sanction the Appellant's dismissal.

Presiding Justice NOLAN and Mr. Justice WENZEL, in their dissent from the opinion of the court below, held that Section 903 is inapplicable on the ground that Appellants are not officers or employees of the city within the meaning of Section 903 (717-723). That point is developed in the brief submitted by the other Appellants herein. The other Appellants also argue that Section 903 does not apply to investigations of Congressional committees; and finally that the section is in derogation of the New York State Education Law, so that it may not be applied to teachers or professors employed by the Board. Those arguments are also advanced by Appellant SLOCHOWER. No purpose would be served by their repetition in this brief, and the Court is requested to consider the points submitted by the other Appellants as having also been urged on Dr. SLOCHOWER's behalf.

POINT I.

Dr. Slochower did not refuse to answer any question relating to his conduct as a teacher or relating to the government, property or affairs of the City. New York City Charter Section 903 is therefore not applicable.

The Appellant SLOCHOWER was a member of the permanent staff of Brooklyn College, and as such could not be removed or deprived of his salary except for cause and after full and fair trial of any charge against him. Education Law §6206.

As the Commissioner of Education states in the official

Appendix A

Memorandum on the Administration of the Regents Rules with Respect to Subversive Activities:

> "Teachers serving on tenure cannot be dismissed, *whether for subversive activities or for any other cause*, without opportunity for hearing, of which a stenographic record must be made. Written charges must be served. Accused teachers must be given an opportunity to appear in person or by counsel, before either a duly appointed trial committee or the full board of education, as the law may provide. Teachers have the right to subpoena witnesses (including their accusers), to present witnesses on their own behalf, and to cross-examine opposing witnesses. They have also the full right of appeal." (Emphasis ours.)

In the instant case, the Appellant was not served with any written charges against him. He was not afforded a hearing nor an opportunity to appear or testify, to produce witnesses or to cross-examine any opposing witness. He was dismissed by simple resolution of the Respondent Board passed at a closed meeting (398).

The Board contends that Appellant's right to his job was forfeit and that all statutory and procedural safeguards to insure against arbitrary dismissal were nullified, because of his refusal to state whether he had been a member of the Communist Party in 1940 or 1941. Section 903 of the New York City Charter is said by Respondents to justify the forfeiture and abrogation of all of Appellant's rights in connection with his position.

Section 903 provides for the termination of the employment of any officer or employee of New York City who refuses, on the grounds of self-incrimination, to answer questions relating to "the property, government or affairs of the city . . . or regarding the . . . official conduct of

any officer or employee of the city. . . ." Obviously, unless the questions not answered relate to "property, government or affairs of the city," or "official conduct," the section is not applicable. It is common knowledge that Section 903 was inspired by the Seabury investigations. *In the Matter of the Investigation of the Departments of The City of New York*, Final Report by SAMUEL SEABURY, December 27, 1932, pp. 101-104; The New York Times, April 27, 1936, p. 33, col. 4, and October 16, 1936, p. 24, col. 3. Judge SEABURY, however, proposed legislation that would apply to inquiries relating to non-official conduct as well as the official conduct of public employees. "As to public officials," Judge SEABURY said, "I do not think the modification (of the privilege against self-incrimination) should be limited to official acts. To so limit it is to raise the question in each case as to whether the acts sought to be inquired into are official or unofficial, public or private." (N. Y. Herald Tribune, May 8, 1932, p. 16, col. 3; matter in parentheses inserted.)

Despite Judge SEABURY's opposition and admonition, the section as enacted was limited to inquiries relating to "official conduct", and "the property, government and affairs of the city." It is thus manifest that the legislature intended to raise the question in each case as to whether the acts inquired into are public or private, official or unofficial. See *Casey* v. *Murphy* (Supreme Court, New York County, Special Term, Part I), New York Law Journal, June 18, 1951, p. 2251, in which Mr. Justice SCHREIBER held that a public officer cannot be dismissed under Section 903 for failure to sign a waiver of immunity, unless the waiver is limited to testimony regarding "the property, government or affairs of the city . . . or official conduct of any officer or employee of the city. . . ."

The Board does not seriously contend that the questions put to Dr. SLOCHOWER relate to the "property, government or affairs of the city," for those are words of art having a special and limited meaning. *Adler* v. *Deegan*, 251 N. Y. 467, 473. They relate only to matters of municipal administration outside the jurisdiction of the State government. *County Securities, Inc.* v. *Seacord*, 278 N. Y. 34, 38. And as Chief Judge CARDOZO noted, in his concurring opinion in *Adler* v. *Deegan*, 251 N. Y. at p. 485, "*education is a function of the state*" and matters relating thereto or to employees of the public education system, cannot be held to pertain to the "government or affairs of the city."

The Board does contend that the questions Dr. SLOCHOWER failed to answer relate to his "official conduct" within the purview of Section 903. It will be remembered that Dr. SLOCHOWER was not asked any question relating to his professional competence, or to the performance of his duties as a teacher. Nor was he asked any question relating to any impropriety or unlawful activity. He was asked only about membership in the Communist Party some 12 years past.

We think it clear from a consideration of its history and correlative laws, if not from the plain sense of its language, that the provision of section 903 of the City Charter relating to "official conduct" applies only to acts done, or which should have been done, under color or by virtue of public office. And it was not intended to apply to the previous political affiliation of a civil service employee. It is a fundamental rule and policy of the state and city governments that the duties and tenure of civil service employees "should not be affected or influenced

ly (their) political opinions or affiliations." *People ex rel. Garvey v. Prendergast*, 148 App. Div. 129, 133. See also *Hale v. Worstell*, 185 N. Y. 247. In furtherance of that policy, the legislature enacted Sections 25 and 26-a of the Civil Service Law, which respectively prohibit the removal of civil service employees because of political affiliation, and make it a penal offense to directly or indirectly ask the political affiliations of any employee in the civil service. The statutes, which cover appellant's position, provide:

> Civil Service Law: "§25. *Recommendations for appointment or promotion*
>
> "No recommendation or question under the authority of this chapter shall relate to political opinions or affiliations of any person whatever; and no appointment or selection to or removal from an office or employment within the scope of the rules established as aforesaid, shall be in any manner affected or influenced by such opinions or affiliations. . . ."
>
> Civil Service Law "§26-a *Inquiry concerning political affiliations of civil service employees prohibited*
>
> "No person shall directly or indirectly ask, indicate or transmit orally or in writing the political affiliations of any employee in the civil service of the state or of any civil division or city thereof or of any person dependent upon or related to such an employee as a test of fitness for holding office. A violation of this section shall be deemed a misdemeanor . . ."

Appendix A

A Consideration of the Argument and Opinions in the Courts Below.

The following arguments were advanced, by Respondent and by the Court at Special Term, to support the contention that past membership in the Communist Party relates to a teacher's official conduct:

1. Proof of former association with the Communist Party may tend to establish present association.

2. As the Communist Party *is* or *may be* dedicated to the destruction of the United States Government, teachers who *were* members "must be deemed committed to that destruction" (656) and may poison the minds of their students (655-656).

3. Appellant, by refusing to answer questions relating to prior party membership, admitted indirectly that he had been committed to the destruction of the government (656-658).

4. The Feinberg Law is evidence of a legislative intent to protect school children from the subversive influence of Communists (642).

The Appellate Division, in sustaining the determination of the Special Term, that past membership in the Communist Party relates to the "official conduct" of a teacher, relied principally on the decision in *Rabouine* v. *McNamara*, 301 N. Y. 785. The foregoing arguments and the authority relied on by the Appellate Division will be considered seriatim.

1.

The Respondent argued below that questions relating to former membership in the Communist Party relate to

"official conduct" because evidence of past association may tend to establish present association. In some circumstances, the continuance of a fact may be presumed from proof of its prior existence. But the presumption of continuance cannot override reason. *Maggio* v. *Zeitz*, 333 U. S. 56, 66. The continuance of anything so transitory as a political affiliation cannot be presumed from its purported existence at a remote time. The Court needs no data to take judicial notice that people frequently change their opinions about politics. (See *Wieman* v. *Updegraff*, 344 U. S. at p. 191).

When one attempts to prove present affiliation by alleging its existence 12 years ago, it may be assumed that there is no evidence to support the inference that it existed in the interim, or that more recent evidence is to the contrary. As stated in *Liverpool & London & Globe Ins. Co.* v. *Nebraska Storage Warehouses*, 96 Fed. 2d 30, at p. 36:

> "It is a general rule that a prior or subsequent existence is evidential of a later or earlier one . . . 'But the limits of time within which the inference of continuance possesses sufficient probative force to be relevant vary with each case. Always strongest in the beginning, the inference steadily diminishes in force with lapse of time, at a rate proportionate to the quality of permanence belonging to the fact in question, *until it ceases, or perhaps is supplanted by a directly opposite inference.*'" (Emphasis ours.)

Questions relating to alleged membership in the Communist Party in 1941 cannot, therefore, be justified on the ground that they are relevant to present membership; particularly where, as in the instant case, direct evidence to prove the contrary is available (536, 545).

2.

The suggestion that a teacher's former membership in the Communist Party is pertinent to the affairs of the City because he may seduce his students or incite them to revolt, assumes that *all* former Communists sought to overthrow the government by force and violence and that one may be forever corrupted by an opinion he may have once held but long since disavowed. There is no basis in fact or in law for either assumption.

It has not been adjudged that the communist organization was dedicated to the overthrow of the United States government in 1940 or in 1941. The organization during that period was not the party now in existence. In 1940 the communist organization dissolved its formal ties with the Soviet Union and the Communist International. 1941 Britannica Book of the Year, a Record of the March of Events of 1940, p. 182. In 1941 and throughout the war years, the Communist Party advocated national unity and attempted to cooperate with the United States government. 1942 Britannica Book of the Year, a Record of the March of Events of 1941, p. 190; 1945 Britannica Book of the Year, a Record of the March of Events of 1944, p. 203.

As the indictment charged in *United States* v. *Dennis*, 341 U. S. 494, the defendants in that case brought about the dissolution of the Communist Political Association after April 1945, and organized in its place the present Communist Party. The alleged purpose and aims of the *new* party, and not its predecessor, were the destruction of the government by violence (341 U. S. at p. 517).

Even if the communist organization had been dedicated at all times to violent revolution, it cannot be assumed

that all persons who were or may have been members advocated violence. To do so is to impute guilt merely because of association, a doctrine abhorrent to our law and tradition. *Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Bridges* v. *Wixon*, 326 U. S. 135, 143-150; *Schneiderman* v. *United States*, 320 U. S. 118, 146. In the *Schneiderman* case, the court, refuting the charge that the petitioner, because he was a Communist, "advocated the overthrow by force and violence of the Government, Constitution and laws of the United States," wrote, at page 136:

> ". . . men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."

And at page 154 (footnote 41):

> "As Chief Justice (then Mr.) HUGHES said in opposing the expulsion of the Socialist members of New York Assembly: '. . . It is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion, or to mere intent in the absence of overt acts . . .'"

In *Wieman* v. *Updegraff*, 344 U. S. 183, the court struck down as unconstitutional an Oklahoma statute requiring every state employee to swear that he was not, and for five years before taking the oath had not been, a member of the Communist Party or of any party or organization officially determined to be a Communist front or subversive organization. The validity of the statute was challenged by members of the faculty of a state college who refused to take the oath. The statute was, without dissent, declared unconstitutional by the United States

Supreme Court. Mr. Justice CLARK, delivering the prevailing opinion, wrote (344 U. S. 190):

"We are thus brought to the question touched on in Garner, Adler and Gerende*: whether the Due Process clause permits a state, in attempting to bar disloyal individuals from its employ, *to exclude persons solely on the basis of organizational membership*, regardless of their knowledge concerning the organizations to which they had belonged. For, under the statute before us, the fact of membership alone disqualifies. . . .

"But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. (Emphasis ours.)

. . . . . .

p. 191:

"Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification: it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and Garner, Adler and Gerende is decisive. *Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power.*" (Emphasis ours.)

(See also *DeJonge* v. *Oregon*, 299 U. S. 353, 362-363; *Herndon* v. *Lowry*, 301 U. S. 242, 258, 261-263; *Bridges* v.

* Referring to *Garner* v. *Los Angeles Board*, 341 U. S. 716, *Adler* v. *Board of Education*, 342 U. S. 485, *Gerende* v. *Board of Supervisors*, 341 U. S. 56.

Wixon, 326 U. S. 135, 142-143, 147-148.) If Dr. Slochower ever was a member of an organization deemed subversive, it is evident from his testimony that he must be numbered among those referred to in Mr. Justice Clark's opinion, who have severed all organizational ties.

The Appellant Slochower has not been accused of any overt, wrongful act. The Board did not intimate that he misled any student in the 27 years that he taught at college. He did not refuse to answer any question, and indeed, was not asked about any seditious act or utterance. The only questions Professor Slochower refused to answer related to possible affiliation with a lawful political party in the years 1940 and 1941. The claim that such question relates to "official conduct" does not presume guilt by association, but guilt by *past* association.

3.

Nor can it be inferred from the mere fact that Appellant Slochower refused to answer the question, that he had been guilty of criminal or objectionable conduct or of any improper activity relating to his official conduct or the affairs of the City. No inference of guilt or wrong-doing can be drawn from the assertion of the privilege against self-incrimination. *Matter of Grae*, 282 N. Y. 428; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219; *Matter of Ellis*, 258 App. Div. 558. In the *Ellis* case, Presiding Justice Lazansky, wrote, in answer to the contention that an attorney was guilty of wrong-doing because of his refusal to answer certain questions on the ground of self-incrimination:

> "The Constitution and the statute are written expressions of the conscience of the People. One who

abides thereby may not in law be deemed a transgressor. The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court. In law, morals and law are one; a legal act is a moral act. Invoking the privilege is a legal act, therefore, a moral act" (258 App. Div. at p. 572).

Mr. Justice LAZANSKY's opinion was in dissent from the majority of the court, but on appeal to the Court of Appeals the determination of the majority was reversed, and that of Mr. Justice LAZANSKY sustained, *Matter of Ellis*, 282 N. Y. 435.

And in *People ex rel. Taylor* v. *Forbes*, 143 N. Y. 219, the court said:

p. 227:

"After the Constitution of the United States had been adopted, it was deemed important to add to it several amendments, and one of them (Art. 5) provides, among other things, that no person 'shall be compelled, in any criminal case, to be a witness against himself.' It was also incorporated into the Constitution of this State (Art. 1, §6) and more recently into the Code of Civil and Criminal Procedure (Code Civil Pro. §37; Code Crim. Pro. §10). These constitutional and statutory provisions have long been regarded as safeguards of civil liberty, quite as sacred and important as the privileges of the writ of habeas corpus or any of the other fundamental guaranties for the protection of personal rights.

"When a proper case arises they should be applied in a broad and liberal spirit in order to secure to the citizen that immunity from every species of self-accusation implied in the brief but comprehensive language in which they are expressed. The security

which they afford to all citizens against the zeal of the public prosecutor, or public clamor for the punishment of crime, should not be impaired by any narrow or technical views in their application. . . ."

. . . . . .

p. 231:

". . . While the guilty may use the privilege as a shield it may be the main protection of the innocent, since it is quite conceivable that a person may be placed in such circumstances, connected with the commission of a criminal offense, that if required to disclose other facts within his knowledge he might, though innocent, be looked upon as a guilty party.

4

Nor can it be claimed that the inquiry into Dr. SLOCHOWER's former political associations is relevant to a teacher's official conduct because of the provisions of the Feinberg Law (Education Law §3022). That law, implementing Civil Service Law §12-a, provides for the dismissal of any public school teacher who is a member of a subversive group advocating the overthrow of the government by unlawful means, *provided the teacher has knowledge of such advocacy. Lederman* v. *Board of Education*, 276 App. Div. 527, at p. 530, affd. 301 N. Y. 476, app. dismissed, 342 U. S. 801. By its terms no group is affected by the statute until it is determined to be subversive by the Board of Regents, Education Law §3022(2).

It was not until September 24, 1953, that the Board of Regents determined the Communist Party to be a "subversive" organization within the meaning of the Feinberg Law and §12-a of the Civil Service Law (New York Times, September 25, 1953, p. 1). The determination, effective the date of its announcement, was made exactly one year

after the Appellant was questioned and more than eleven months after he was dismissed by the Board.

Thus, Respondent argues that the questions put to Dr. SLOCHOWER concerning matters that occurred in *1940* were relevant to his official duties in September, *1952*, by virtue of provisions incorporated in a statute in September, *1953*.

5

The Appellate Division, in holding that an inquiry into membership in the Communist Party 11 or 12 years ago is relevant to a teacher's "official conduct," appears to have relied on the decision of this Court in *Rabouine* v. *McNamara*, 301 N. Y. 785 (713). The determination in the *Rabouine* case is not apposite to the issues here presented. The *Rabouine* case involved the interpretation of a regulation permitting the Municipal Civil Service Commission to disqualify a probationary appointee if he was found to have an unsatisfactory *character* or *reputation*. The Commission decided, after appropriate hearing in that case, that a probationary patrolman's "general character or reputation" was "not good." (*Rabouine* v. *McNamara*, Papers on Appeal in Court of Appeals, fols. 58, 93). In arriving at its decision, the Commission considered evidence relating to the probationary employee's failure to serve in the armed forces, and his membership in the Communist Party within the year of the hearing (*Rabouine*, fols. 75-85, 69). There was no issue or determination in the *Rabouine* case relating to the definition, construction or application of the term "official conduct," and the case can hardly be considered controlling with respect to the questions here presented.

We think it clear that the questions put to Dr. SLOCHOWER were not, at the time of his interrogation, related to his official conduct or the affairs of the city within the meaning of Charter Section 903. If there is any doubt on that point, it must be resolved in favor of the Appellant. As the Justices dissenting from the majority of the Appellate Division in this case observed, Section 903 provides for a forfeiture of employment or office (722). It must, therefore, be narrowly construed, and its application may not be enlarged by implication or by a broad construction of its language. *Crane* v. *Monaghan* (Special Term, Supreme Court, New York County) New York Law Journal, May 12, 1953 at p. 1589. See also *Guesseldt* v. *McGrath*, 342 U. S. 308; *Matter of Benedict* v. *La Guardia*, 252 App. Div. 540, 544, affd. 277 N. Y. 674.

POINT II.

Appellant Slochower was deprived of property rights without due process of law, in violation of Article I, §10, and the Fourteenth Amendment of the United States Constitution, and Article I, §6, of the New York State Constitution.

The right to government employment (where it is denied as a punitive measure) is a property right within the protection of the Federal and State constitutions. *Wieman* v. *Updegraff*, 344 U. S. 183; *United States* v. *Lovett*, 328 U. S. 303; *Matter of Hamilton* v. *Brennan*, 203 Misc. 536. As the court, in *Wieman* v. *Updegraff*, said in commenting on references to its earlier opinions in *Adler* v. *Board*

of Education, 342 U. S. 485, and *United Public Workers* v. *Mitchell*, 330 U. S. 75:

> "We are referred to our statement in *Adler* that persons seeking employment in the New York public schools have 'no right to work for the State in the school system on their own terms'. *United Public Workers* v. *Mitchell* . . . . They may work for the school system upon the reasonable terms laid down by the proper authorities of New York.' 342 U. S. at 492. To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory" (344 U. S. at pp. 191-192).

The Appellant Dr. Slochower had acquired certain rights in connection with his position, including tenure and the right to a fair trial of any accusation against him. The Board maintains that Dr. Slochower was deprived of those rights by the 'automatic' operation of the punitive provision of City Charter section 903.

It is a fundamental principle of justice that punishment may not be meted out for offense against a law unless those subject to the law are afforded a reasonable opportunity to learn what is prohibited. *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Winters* v. *New York*, 333 U. S. 507; *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 239. The Appellant in the instant case could not have known, at the time of the inquiry in question, that it related (as Respondent claims) to his "official conduct" and therefore was within the comprehension of section 903.

The investigating sub-committee was not empowered to consider, and specifically stated that its questions would not be directed to "official conduct of city employees" (46, 47, 76, 83).

Moreover, at the time of the inquiry, there had been no determination under the Feinberg Law (Education Law §3022) that the Communist Party was a "subversive" organization, so that membership therein would affect a teacher's eligibility. The retroactive application of that determination is constitutionally prohibited. COOLEY, A Treatise on the Constitutional Limitations, 8th Edition, Vol. I, p. 545; *Cummings* v. *The State of Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *United States* v. *Lovett*, 328 U. S. 303. As the court held in *United States* v. *Lovett*, 328 U. S. 303, 316:

> "No one would think that Congress could have passed a valid law, stating that after investigation it found Lovett, Dodd, and Watson 'guilty' of the crime of engaging in 'subversive activities,' *defined that term for the first time*, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule'. The Constitution declares that that cannot be done either by a State or by the United States." 328 U. S. 303, 316. (Emphasis supplied.)

POINT III

Section 903 of the New York City Charter is an unconstitutional abridgment of rights guaranteed by Article I, Section 6 of the New York State Constitution. The Section is void and of no effect and cannot be held to sanction the appellant's dismissal.

Article I, Section 6, of the New York Constitution guarantees the right against self-incrimination to all within its purview. The right obtains in legislative investigations as in other legal proceedings. *Matter of Doyle*, 257 N. Y. 244. The single constitutional limitation to that right, hereinafter discussed, does not apply to this case.

Section 903 abridges the right to refuse to give answers which may tend to incriminate, for it directs the dismissal of a city officer or employee who exercises the right. Coercion to relinquish a constitutional right by threatening discharge from employment, or disbarment from a profession is a curtailment of the right. *Matter of Ellis*, 258 App. Div. 567-568, 572.* A statute curtailing a constitutional right or privilege, or which evades even an implied purpose of the constitution, is void and of no effect. *People ex rel. Bolton et al. v. Albertson*, 55 N. Y. 50, 55; *Matter of Hopper* v. *Britt*, 203 N. Y. 144, 149; *People* v. *Allen*, 301 N. Y. 287, 290.

It is unnecessary to consider at this time whether public employment is a right, or a privilege upon which special conditions may be imposed, for a statute may not condition a privilege or the continuance of a privilege upon the relinquishment of a constitutional right. *Frost*

* The references are to Presiding Justice LAZANSKY's dissent. See comment at p. 17 of this brief.

v. *Railroad Commission*, 271 U. S. 583, 593. See also, discussion at pp. 20-21 of this brief.

Article I, Section 6 of the Constitution of the State of New York states:

> "No persons shall . . . be compelled . . . to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall . . . be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

Particular attention is directed to the proviso permitting the discharge of public officers who refuse *before grand juries*, to waive immunity or to answer questions relating to the conduct of their office. Presiding Justice Lazansky, referring to it in *Matter of Ellis*, 258 App. Div. at p. 575 said:

> "It should be noted that the failure to sign a waiver of immunity applies only to testimony of a public officer before a grand jury and concerning the conduct of his office or the performance of official duties. It does not refer to a public officer called to testify before a grand jury concerning the acts of any other persons; *it does not apply in any wise to legislative investigations* or to those directed by the Governor or the courts." (Emphasis ours.)

Section 903 of the Charter, it will be remembered, provides for dismissal of an officer or civil servant who refuses to waive immunity or to answer questions in an in-

quiry before "*any legislative committee* or any officer, board or body authorized to conduct any hearing."

The express inclusion of the single exception (relating to inquiries before grand juries) to the right granted by the Constitution bars any other exception or qualification. New York Statutory Construction Law, Sections 211, 212, 213 and 240. That canon of interpretation applies with greater force in the construction of constitutional provisions, for the language of the constitution is presumed to be selected with greater care and exactness. RULES OF CONSTITUTIONAL INTERPRETATION, Section 7; *Matter of Wendell* v. *Lavin*, 246 N. Y. 115; *People ex rel. Gilbert* v. *Wemple*, 125 N. Y. 485. Under that rule Article I, Section 6 of the Constitution must be held to prohibit the enactment of any law providing for punishment or discharge from office of any person because of refusal to testify on the grounds of self-incrimination, in any inquiry other than one before a grand jury.

We shall not rest on a rule of interpretation. As will be shown, it was the stated intent of those who drafted the proviso to Article I, Section 6 of the Constitution to preclude any statutory abridgement of the right against self-incrimination in any inquiry other than one before a grand jury.

Before January 1, 1939, the

> ". . . nor shall he be compelled in any criminal case to be a witness against himself" (Constitution of the State of New York, 1894, Art. I, Section 6).

The proviso permitting discharge of officers who refuse to testify or waive immunity before a grand jury, was added by an amendment adopted by the Constitutional

Convention of 1938, (McKinney, Constitution of the State of New York, pp. 292-293). The first draft of the proviso submitted to the Convention was very much broader than that finally adopted. At the suggestion of Mr. Justice POLETTI, the penalty therein provided, of removal from office for refusal to testify or waive immunity, was limited to inquiries relating to the official duties of the public officer questioned. New York Constitutional Convention 1938, Revised Record, vol. III, p. 2586. Thereafter, on motion of Mr. Justice MARTIN, the proviso was again amended to further limit its application to officers who refuse to testify before a grand jury. Revised Record, vol. III, p. 2588, vol. IV, pp. 2599-2600. That the Convention intended by so limiting the proviso, to prevent any further invasion of the constitutional right against self-incrimination is abundantly clear from the following, extracted from the minutes of the Convention:

New York Constitutional Convention 1938, Revised Record, vol. III, p. 2586:

"Mr. Poletti: . . . the committee gave very careful study to this matter. In fact it amended the proposal of Mr. Halpern in several respects; in one respect a very important change, and I think we should note it here. This proposal is directed to public officers, that is, it intends to set them aside and treat them specially, but it deals with public officials only with respect to their official duties. It does not relate to non-official duties. . . ."

p. 2588:

"Mr. Martin: I offer an amendment as follows: on line 6, after the word 'answer' insert 'before a grand jury.' Then a public official is protected; otherwise he is not protected. I have seen investigations

when I was district attorney, which were nothing but political, and where they attempted to make officials testify before committees, and where those officials were just being bullyragged before the committee. Put him before a grand jury. He has no counsel there and he is protected before the grand jury. . . ."

p. 2589:

"Mr. Martin: . . . . Before the grand jury he would be protected. We would not have the newspapers putting in the part of his testimony they liked and leaving out the part that was favorable to him. This will be a general protection to the people and will be a general protection to the public official, and would be in the interest of justice."

p. 2590:

Mr. Martin: My first amendment is the substantial one. It goes right to the core of the question. Public officials should not be bullyragged by opposing partisans or someone who has a grudge against them, but at the same time they should not be excused; they should go before a grand jury and testify. As far as I am concerned, my amendment is intended to protect the public official, and to assure all that he is not the prey of anybody who has a grudge against him."

p. 2592:

"Mr. Halpern: My objection to Judge Martin's amendment is it prevents the application of this salutary and very important principle to legislative investigations."

. . . . . .

"Mr. Martin: . . . As the law is today, they are not compelled to answer before anybody, and they are not compelled to testify. We are broadening the

law, but in our effort to broaden the law, we should not destroy the whole body of criminal law by making a public official take the stand in a case or resign from his office, and we should protect him the same as we protect every other citizen. . . ."

Vol. IV, p. 2597:

"Mr. Martin: If you are going to forfeit the office of every public official who feels that he is being tried before some committee, even before a Governor, for political reasons, then public officers are certainly in a bad position in this State. I think if we limit it right to the grand jury, we will have accomplished justice to all."

p. 2599:

"Mr. Martin: I do not believe in allowing investigation when the investigator will first send for the newspapers, and then when the public official comes in, try to crucify him. *No matter whether he is a Republican, a Democrat, or a Communist, it makes no difference to me, I think that public official should be protected the same as any other citizen and should not be abused by these so-called investigations*, many of which are going on today throughout this whole country, and are for no other purpose than to annoy the public officials.

I say this amendment would stop all that and protect everyone involved." (Emphasis ours.)

It is evident from the foregoing that Article I, Section 6 of the New York constitution as amended was designed to protect public officials as well as all other citizens from loss of office or other punishment because of refusal to testify about political affiliation, or because of refusal to testify before a legislative committee. The reasons the constitutional amendment was so drawn are explicitly

and forcefully set forth in the quoted statements, and further comment would be unwarranted.

The prevailing opinion of the Appellate Division in this case cites *Canteline* v. *McClellan*, 282 N. Y 166, and *McAuliffe* v. *New Bedford*, 155 Mass. 216, a authorities to support the conclusion that "The charter provision does not abridge the constitutional privilege against self incrimination" (714-715). Neither case is pertinent. In *Canteline* v. *McClellan* the appellants, both police commissioners, refused to waive immunity when called before a grand jury. They were threatened with suspension *pursuant to* the proviso of the New York State Constitution hereinbefore quoted (which provides for removal of officers failing to waive immunity before a grand jury). This Court in the *Canteline* case held that the proviso of Article I, §6, of the New York State Constitution, and its proposed application did not offend the United States Constitution. But we are not here challenging the validity of Article I, §6, of the New York Constitution. We submit, on the contrary, that Section 903 of the City Charter is void because it violates the letter and intent of that section of the State Constitution.

McAuliffe v. *New Bedford*, 155 Mass. 216, has no greater bearing on the issues in this case. The petitioner McAuliffe, also a police officer, was removed for violating a department rule against solicitation of funds for political purposes. Mr. Justice Holmes, speaking for the court, held the department rule in question to be valid. The question of the privilege against self-incrimination was not involved or even referred to in the recital of the facts, the argument, or the opinion in the case.

Appendix A

Conclusion

Section 903 was here applied to warrant the dismissal of Professor Slochower for refusing to answer questions relating to his political affiliation in 1940 and 1941, in an inquiry conducted by a legislative committee. The section itself did not authorize the action taken. Moreover, Section 903, and the Respondent's application of the section offend the provisions, purpose and spirit of the United States and New York State Constitutions.

The order dismissing the petition of the appellant Slochower should be reversed, and the prayer of the petition granted.

Respectfully submitted,

London, Simpson & London,
Attorneys for Appellant, Harry Slochower.

Ephraim S. London,
Sherman P. Kimball,
Of Counsel.

APPENDIX B

To Be Argued by
EPHRAIM LONDON.

Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT.

IN THE MATTER

of

The Application of VERA SHLAKMAN, BERNARD F. RIESS, HARRY SLOCHOWER, SARAH R. RIEDMAN, HENRIETTA A. FRIEDMAN and MELBA PHILLIPS,

Petitioners-Appellants,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Respondent.

BRIEF FOR THE APPELLANT HARRY SLOCHOWER.

Statement.

This appeal is from an order in a proceeding instituted under Article 78 of the Civil Practice Act. Appellants were instructors and professors in colleges in the New York public school system. Respondent (hereinafter referred to as "the Board") is the governing body of the public colleges in New York City, Education Law §6201, 6202. On October 6, 1952, the Board discharged Appel-

lants without charges, notice or hearing (376, 53-54 Par. 13)* "pursuant to the provisions of Section 903 of the New York City Charter" (399).

These proceedings were instituted to reinstate appellants. The petition herein alleges that appellants were wrongfully discharged, that Section 903 did not authorize their dismissal, and that appellants' constitutional rights had been violated (376, 54-64, 381-382).

The order appealed from, which was made at Special Term, Part I, of the Supreme Court, Kings County on December 11, 1952, denies and dismisses the appellants' petition (25-29).

The petitioner-appellant HARRY SLOCHOWER appears separately and this brief is filed on his behalf.

Facts.

The appellant HARRY SLOCHOWER was an Associate Professor of Literature and of German at Brooklyn College (399, 527). On September 24, 1952, he testified before a sub-committee of the U. S. Senate appointed to investigate the administration of the Internal Security Laws (383). The sub-committee did not question Dr. SLOCHOWER about his loyalty to the Government of the United States or about his work or conduct as a teacher. He was not asked if he ever advocated the overthrow of the government, or if he was a member of any organizations that he knew to be subversive. The Committee was concerned chiefly with the question of whether or not Professor SLOCHOWER was a member of the Communist Party during the years 1940-1941 (525-569). It is worthy of note

* Unless otherwise indicated, numbers in parentheses refer to corresponding folios in the Papers on Appeal.

that, although the sub-committee asked the other teachers, instructors and professors involved in this proceeding about their present membership in the Communist Party (93, 102, 103, 121, 122, 131), it failed to ask that question of Dr. SLOCHOWER. The Committee deliberately limited its interrogation with respect to Dr. SLOCHOWER's Communist affiliations to the period from 1940-1941 (529-530, 532, 536, 539, 564). Indeed, Dr. SLOCHOWER stated voluntarily, "I am not a member of the Communist Party" (536), and stated further, "within my field I have expressed myself in many ways which directly and by implication are counter* to some doctrines held by many Communists. * * * I say that in my field, I could point to a number of things I differ if not am opposed to positions held on these questions * * * by many Communists" (548). Dr. SLOCHOWER also volunteered to answer all questions relating to his political affiliations and activities during the period after 1941 (544), but the Committee was not interested in following that line of inquiry.

Professor SLOCHOWER refused to state whether or not he had been a member of the Communist Party in the years 1940 or 1941. He refused on the ground that his answer might tend to incriminate him (538-539). He added, however, "I am not implying I am guilty. I understand that the Fifth Amendment has been put into the Constitution for the purpose of protecting the innocent" (539). Dr. SLOCHOWER also refused to state whether he had been known under an alias during the period from 1940 to 1941 (568).

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* Mistakenly reported as "accounted." The error is apparent from the context of the following answer.

Appendix B

On October 6th, Dr. SLOCHOWER was summarily dismissed from his position as a college professor (399). He was dismissed without notice or hearing, though he had been a college teacher for twenty-seven years (378) and had tenure by statute, Education Law §6206. The only reason given for his discharge was that he had refused to answer the questions referred to (389-395). It was not claimed that he had been guilty of any misconduct in any classroom, or that his work was in any way unsatisfactory. Indeed, the contrary was true, for Professor SLOCHOWER is widely known as a scholar, lecturer, and literary critic, and has received the Bollingen Award, and a Guggenheim Fellowship.

Professor SLOCHOWER's summary dismissal was held to be pursuant to §903 of the New York City Charter (the text of which is appended) which provides for the termination of the employment of a City employee who refuses to testify relating to the "property, government or affairs of the city . . . or official conduct of any officer or employee of the city . . . on the ground that his answer would tend to incriminate him . . ."

Argument.

The Appellant SLOCHOWER had tenure of office within the meaning of Education Law §6206. He could not be dismissed except for cause and only after due notice and an opportunity to defend himself at a hearing. Education Law §6206(10). The Board relies entirely on the provisions of Section 903 of the City Charter, which it claims is self-executing or automatic in its operation. It contends that, where an employee is dismissed under that section, there is no necessity for notice or hearing. The Board will, we believe, concede that, if Charter Section

903 is inapplicable, the Appellant was wrongfully discharged. It could not, independently of the statute, have punished Dr. SLOCHOWER for exercising a constitutional right, *Matter of Grae*, 282 N. Y. 428, 434.

It is argued in the briefs submitted for the other Appellants that they are not employees or officers of the city within the meaning of Section 903, and it is therefore inapplicable to them. It is also therein argued that Section 903 does not apply to investigations by Congressional Committees; and finally, that the Section is in derogation of the New York State Education Law, so that it may not be applied to teachers or professors employed by the Board, even if that application was intended by the Legislature.

Those arguments are also advanced by the Appellant SLOCHOVER. No purpose would be served by their repetition in this brief, and the Court is requested to consider the points in the other Appellants' brief as having also been urged on DR. SLOCHOWER'S behalf.

It is believed that Section 903 cannot justify Dr. SLOCHOWER'S dismissal for other and equally compelling reasons hereinafter discussed, namely:

1. The section is by its terms applicable only if an employee refuses to answer questions "regarding the property, government or affairs of the city, . . . or regarding the nomination, election, appointment or official conduct of any officer or employee of the city, ..." No such questions were asked of Dr. SLOCHOWER. His discharge pursuant to the provisions of that ection was, therefore, improper.

2. Section 903 of the City Charter contravenes Article I, Sec. 6 of the New York State Constitution; it is for that reason void, and no valid action may be taken thereunder.

Appendix B

POINT I.

New York City Charter Section 903 is not applicable, for Dr. Slochower did not refuse to answer any question relating to his conduct as a teacher or relating to the government, property or affairs of the city.

Section 903 of the City Charter is, by its terms, limited to cases in which a city employee refuses, on the ground of self-incrimination, to answer questions relating to "*the property, government or affairs of the city . . . or regarding the nomination, election, appointment or official conduct of any officer or employee of the city. . . .*"

The words "property, government or affairs of the city" are words of art and have a special and limited meaning. *Adler* v. *Deegan*, 251 N. Y. 467, 473. They do not include everything pertaining to the city or its people, but are limited to matters that are outside the jurisdiction of the state government. *Adler* v. *Deegan, supra.* Education being a state function may not be considered an "affair of the city" within the purview of Section 903. As Judge CARDOZO said, in his concurring opinion in *Adler* v. *Deegan*, 254 N. Y. 467, at p. 485:

> "There may be difficulty at times in allocating interests to State or municipality, and in marking their respective limits when they seem to come together. If any one thing, however, has been settled in this realm of thought by unison of opinion, it is the statewide extension of the interest in the maintenance of life and health. The advancement of that interest, like *the advancement of education, is a function of the state at large.* I do not know how many statutes we shall have to uproot, nor where we shall have to draw

> the line hereafter, nor what confusion we may be inviting, if we speak differently now." (Emphasis ours.)

As that point is touched upon in the other Appellants' brief, and is implict in the argument that college professors employed by the Board are not "employees of the city," it will not be discussed further.

It is clear from a consideration of its history that Section 903 was intended to apply only to public officers who invoked the constitutional privilege to cloak malfeasance in the performance of their official duties, and that it was not intended to deprive city employees of their privilege against self-incrimination (or of their positions if they assert the privilege) as to all possible matters of inquiry.

It is common knowledge that Section 903 was inspired by the Seabury investigations. *In the Matter of the Investigation of the Departments of The City of New York*, Final Report by SAMUEL SEABURY, December 27, 1932, pp. 101-104; The New York Times, April 27, 1936, p. 33, col. 4, and October 16, 1936, p. 24, col. 3. Judge SEABURY, however, proposed legislation that would apply to inquries relating to non-official conduct as well as the official conduct of public employees. "As to public officials," Judge SEABURY said, "I do not think the modification (of the privilege against self-incrimination) should be limited to official acts. To so limit it is to raise the question in each case as to whether the acts sought to be inquired into are official or unofficial, public or private." (N. Y. Herald Tribune, May 8, 1932, p. 16, col. 3; matter in parentheses inserted).

Despite Judge SEABURY's opposition and admonition, the section as enacted was limited to inquiries relating

to "official conduct", and "the property, government and affairs of the city." It is thus manifest that the legislature intended to raise the question in each case as to whether the acts inquired into are public or private, official or unofficial. See *Casey* v. *Murphy* (Supreme Court, New York County, Special Term, Part I), New York Law Journal June 18, 1951, p. 2251, in which Mr. Justice SCHREIBER held that a public officer cannot be dismissed under Section 903 for failure to sign a waiver of immunity, unless the waiver is limited to testimony regarding "the property, government or affairs of the city . . . or official conduct of any officer or employee of the city. . . ."

A public employee's membership in or affiliation with a political party is not a concern of the City unless it involves some unlawful act or conduct affecting the City. The Appellant here, it will be recalled, was not asked whether he did or said any unlawful or prohibited thing, but merely whether he was a member of the Communist Party in 1940 and 1941. Many unpleasant things have been said about Communists and the Communist Party, and they will no doubt be repeated in the Respondent's brief. Whether or not the statements made about the party are true, membership in it, as the court below conceded, is not in itself unlawful (646). Mr. Justice BREWSTER in his opinion in *Thompson* v. *Wallin*, 276 App. Div. 463 (aff'd 301 N. Y. 476, appeal dismissed 342 U. S. 801), wrote (p. 468):

> "Communism is a doctrine of ancient origin and . . wide concept, and a school of thought, party, group or organization which believes in, teaches or advocates it, *may or may not* advocate its advance by an overthrow of our organized governments by force and

violence. (Matter of Lithuanian Workers' Literature Society, 196 App. Div. 262). We may take notice that to do so is not an essential of its basic doctrine" (emphasis ours).

See also the opinion of this court in *Lederman* v. *Board of Education*, 276 App. Div. 527, at p. 530, (aff'd 301 N. Y. 476, appeal dismissed 342 U. S. 801).

It must also be conceded that a teacher may not be denied employment in a state public school system merely because of his membership in the Communist Party, *Wieman* v. *Updegraff*, 344 U. S. 183 (decided December 15, 1952). *Wieman* v. *Updegraff* involved an Oklahoma statute requiring every state employee to swear that he was not, and for five years before taking the oath was not, a member of the Communist Party or of any party or organization officially determined to be a Communist front or subversive organization. The validity of the statute was challenged by members of the faculty of a state college who refused to take the oath. The statute was, without dissent, declared unconstitutional by the United States Supreme Court. Mr. Justice CLARK, delivering the prevailing opinion, wrote (344 U. S. 190):

"We are thus brought to the question touched on in Garner, Adler and Gerende*: whether the Due Process clause permits a state, in attempting to bar disloyal individuals from its employ, *to exclude persons solely on the basis of organizational membership*, regardless of their knowledge concerning the organizations to which they had belonged. For, under the statute before us, the fact of membership alone disqualifies. . . .

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* Referring to *Garner* v. *Los Angeles Board*, 341 U. S. 716. *Adler* v. *Board of Education*, 342 U. S. 485. *Gerende* v. *Board of Supervisors*, 341 U. S. 56.

"But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. (Emphasis ours.)

* * * * * * *

p. 191:

"Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and Garner, Adler and Gerende is decisive. Indiscriminate classification of innocent with knowing activity must fail as an assertion of arbitrary power".

(See also *DeJonge* v. *Oregon*, 299 U. S. 353, 362-363; *Herndon* v. *Lowry*, 301 U. S. 242, 258, 261-263; *Bridges* v. *Wixon*, 326 U. S. 135, 142-143, 147-148.) If Dr. SLOCHOWER ever was a member of an organization deemed subversive, it is evident from his testimony that he must be numbered among those referred to in Mr. Justice CLARK's opinion, who have severed all organizational ties.

Section 25 of the Civil Service Law prohibits the removal of any public employee affected thereby, because of his political affiliations or opinions. The Appellant's position is covered by the statute which provides:

Civil Service Law: "25. *Recommendations for appointment or promotion*

"No recommendation or question under the authority of this chapter shall relate to the political opinions or affiliations of any person whatever; and no appointment or selection to or removal from an office or employment within the scope of the rules established as aforesaid, shall be in any manner affected or influenced by such opinions or affiliations. . . ."

As previously noted, the Communist Party is not illegal. Its status under the section is precisely the same as that of any other lawful party. The appellant SLOCHOWER could not have been removed for stating, in answer to the question asked, that he had been or that he had not been a member of the Communist Party in 1940 or 1941; it would be strange indeed if he could be removed for refusing to answer the question. Moreover, since the question of political affiliation is by statute dissociated from offices held under the civil service law, it may hardly be said to be a matter relating to official conduct, or the affairs of the government.

A question relating solely to Communist Party membership thus has no greater relevance to the official conduct of a teacher, or to the affairs of the City, than a question relating solely to membership in the Democratic, Republican or Socialist Parties.

A Consideration of the Opinion of the Court Below.

The court at Special Term, in its opinion denying the Appellant's petition, suggested that the question relating to membership in the Communist Party is revelant to the performance of a teacher's official conduct because:

1. Students exposed to Communist teachers may

be mentally and morally debauched, and their minds poisoned (655-656, 667).

2. Appellant, by refusing to answer questions relating to party membership, admitted indirectly that he had been committed to the destruction of the government (656-658).

3. The Feinberg Law is evidence of a legislative intent to protect school children from the subversive influence of Communists (642).

Those arguments will be considered seriatim.

1.

The suggestion that a teacher's membership in the Communist Party is pertinent to the affairs of the City because, as a Communist he may seduce his students or incite them to revolt, assumes (a) that *all* Communists seek to overthrow the government by force and violence; and (b) that given the opportunity, *all* Communists would try to inculcate their political principles. There is no basis in law or fact for either assumption. The court below imputed guilt merely because of association, a doctrine abhorrent to our law and tradition. *Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Bridges* v. *Wixon*, 326 U. S. 135, 143-150; *Schneiderman* v. *United States*, 320 U. S. 118, 146. In the *Schneiderman* case, the court, refuting the charge that the petitioner, because he was a Communist, "advocated the overthrow by force and violence of the Government, Constitution and laws of the United States," wrote, at page 136:

> ": . . . men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."

And at page 154 (footnote 41):

"As Chief Justice (then Mr.) HUGHES said in opposing the expulsion of the Socialist members of the New York Assembly: '. . . It is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion, or to mere intent in the absence of overt acts . . .'"

Certainly the Appellant Dr. SLOCHOWER has not been accused of any overt, wrongful act. The Board did not intimate that he misled even a single student in the 27 years that he taught at college. He did not refuse to answer any question, and indeed, was not asked about any seditious act or utterances. The only questions Professor SLOCHOWER refused to answer related to lawful affiliation with a political party in the years 1940 and 1941. The claim that such question relates to "official conduct" does not presume guilt by association, but guilt by *past* association. It assumes that one is forever corrupted by an opinion once held and long since disavowed. It is inconceivable that Section 903 was intended to authorize the dismissal of a college professor for refusal to answer any such question.

2.

Nor can it be inferred from the mere fact that Appellant SLOCHOWER refused to answer the question, that he had been guilty of criminal or objectionable conduct or of any improper activity relating to his official conduct or the affairs of the City. No inference of guilt or wrongdoing can be drawn from the assertion of the privilege against self-incrimination. *Matter of Grae*, 282 N. Y. 428; *People ex rel. Taylor* v. *Forbes*, 143 N. Y. 219; *Matter of Ellis*, 258 App. Div. 558. In the *Ellis* case, Mr. Justice

LAZANSKY, then Presiding Justice of this Court, wrote, in answer to the contention that an attorney was guilty of wrong-doing because of his refusal to answer certain questions on the ground of self-incrimination:

> "The Constitution and the statute are written expressions of the conscience of the People. One who abides thereby may not in law be deemed a transgressor. The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court. In law, morals and law are one; a legal act is a moral act. Invoking the privilege is a legal act, therefore, a moral act" (258 App. Div. at p. 572).

Mr. Justice LAZANSKY's opinion was in dissent from the majority of the court, but on appeal to the Court of Appeals the determination of the majority was reversed, and that of Mr. Justice LAZANSKY sustained, *Matter of Ellis*, 282 N. Y. 435.

And in *People ex rel. Taylor* v. *Forbes*, 143 N. Y. 219, the court said:

p. 227:

> "After the Constitution of the United States had been adopted, it was deemed important to add to it several amendments, and one of them (Art. 5) provides, among other things, that no person 'shall be compelled, in any criminal case, to be a witness against himself.' It was also incorporated into the Constitution of this State (Art. 1, §6) and more recently into the Code of Civil and Criminal Procedure (Code Civil Pro. §37; Code Crim. Pro. §10). These constitutional and statutory provisions have long been regarded as safeguards of civil liberty, quite as sacred and important as the privileges of the writ of habeas corpus

or any of the other fundamental guaranties for the protection of personal rights.

"When a proper case arises they should be applied in a broad and liberal spirit in order to secure to the citizen that immunity from every species of self-accusation implied in the brief but comprehensive language in which they are expressed. The security which they afford to all citizens against the zeal of the public prosecutor, or public clamor for the punishment of crime, should not be impaired by any narrow or technical views in their application. . . ."

* * * * * *

p. 231:

". . . While the guilty may use the privilege as a shield it may be the main protection of the innocent, since it is quite conceivable that a person may be placed in such circumstances, connected with the commission of a criminal offense, that if required to disclose other facts within his knowledge he might, though innocent, be looked upon as a guilty party.

3.

Nor can it be claimed that the inquiry into Dr. SLOCHOWER's former political associations is relevant to the affairs of the City because of the provisions of the Feinberg Law (Education Law §3022). That law, implementing Civil Service Law §12-a, provides for the dismissal of any public school teacher who is a member of a subversive group advocating the overthrow of the government by unlawful means, *provided the teacher has knowledge of such advocacy. Lederman* v. *Board of Education*, 276 App. Div. 527, at p. 530. No group is affected by the statute until it is determined to be subversive by the Board of Regents, Education Law §3022(2).

Appendix B

Space permits an outline of only two of the cogent reasons the Feinberg Law cannot be resorted to in the instant case. They are:

(1) The Communist Party is not a subversive organization within the meaning of the statute, for it has not been listed as such by the Board of Regents. It is true, as the court below noted, that the preamble to the Feinberg Law refers to the Communist Party as a "subversive group" (642-643). But the preamble to the statute is not an enactment. It is merely an expression of "common report" and it cannot be considered a finding that the Party is in fact subversive. *Lederman* v. *Board of Education*, 276 App. Div. 463, at p. 530 (aff'd 301 N. Y. 476, appeal dismissed 342 U. S. 801).

(2) The questions asked of Dr. SLOCHOWER cannot be held to relate to the Feinberg Law because the law was passed in 1949 and is prospective in operation. *Lederman* v. *Board of Education*, 276 App. Div. 527, at p. 530. The questions that Dr. SLOCHOWER refused to answer were limited in time to the period from 1940 to 1941, eight to nine years before the law was passed. A retroactive application of the law would offend the United States Constitution. *Cummings* v. *The State of Missouri*, 4 Wall. 277, *Ex Parte Garland*, 4 Wall. 333, *United States* v. *Lovett*, 328 U. S. 303.

The court below also reasoned that, as membership in the Communist Party is not a crime, the Appellants had no legal right to refuse to answer any question relating to party membership (650, 652, 654-655, 657, 663, 665). It proceeded from that erroneous conclusion to another, namely: that Appellants must have been guilty of intellectual dishonesty and were, therefore, properly dis-

charged by the Board (652-667). The court's statement (repeated five times) that one may not invoke the privilege of refusing, under the Fifth Amendment, to answer questions relating to Communist affiliation (650, 652, 654-655, 657, 663, 665), is in direct conflict with the decisions of the United States Supreme Court in *Patricia Blau* v. *U. S.*, 340 U. S. 159, and *Irving Blau* v. *U. S.*, 340 U. S. 332. With respect to the court's final conclusion: it would seem evident that Section 903, no matter how broadly interpreted, cannot be held to authorize the peremptory dismissal of teachers or college professors because of their intellectual dishonesty.

We think it clear that the questions Dr. SLOCHOWER refused to answer were entirely unrelated to his official duties and the affairs of the City. If there still be any doubt on that point, it should be dispelled by the statement of Senator FERGUSON, Chairman of the committee conducting the inquiry, to the effect that he was not concerned with the Appellants conduct "from the point of view of the property, government or affairs of the City . . . or official conduct of the city employees" (46-47). Certainly the intent and purposes of the questioner must be considered a factor of weight in determining what matters were relevant to the questions asked.

POINT II

Section 903 of the New York City Charter is an unconstitutional abridgment of rights guaranteed by Article I, Section 6 of the New York State Constitution. The Section is void and of no effect and cannot be held to sanction the appellant's dismissal.

Article I, Section 6, of the New York Constitution guarantees the right against self-incrimination to all within its purview. The right obtains in legislative investigations as in other legal proceedings. *Matter of Doyle*, 257 N. Y. 244. The single limitation to that right, hereinafter discussed, does not apply to this case.

Section 903 directs the dismissal of any city officer or employee who avails himself of the constitutional privilege against self-incrimination. Coercion to waive one's constitutional privilege, by threatening discharge from employment or disbarment from a profession if he refuses to do so, is an abridgment of the privilege. In *Matter of Ellis*, 258 App. Div. 567-568, 572*. Any statute abridging a constitutional right or privilege, or which evades even an implied purpose of the state constitution, is void and of no effect. *People ex rel. Bolton et al.* v. *Albertson*, 55 N. Y. 50, 55; *Matter of Hopper* v. *Britt*, 203 N. Y. 144, 149; *People* v. *Allen*, 301 N. Y. 287, 290. It is unnecessary to consider whether public employment is a right, or a privilege upon which special conditions may be imposed, for a statute may not condition a privilege or the continuance of a privilege upon the relinquishment of a con-

* The references are to Presiding Justice LAZANSKY's dissent. See comment at p. 14 of this brief.

stitutional right. *Frost v. Railroad Commission*, 271 U. S. 583, 593. Moreover, Article I, Section 6 of the constitution was intended to prohibit enactments similar to Section 903.

Article I, Section 6 of the Constitution of the State of New York states:

> "No person shall . . . be compelled . . . to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall . . . be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

Particular attention is directed to the proviso permitting the discharge of public officers who refuse *before grand juries* to waive immunity or to answer questions relating to the conduct of their office. Presiding Justice Lazansky, referring to it in *Matter of Ellis, supra*, said (258 App. Div. at p. 575):

> "It should be noted that the failure to sign a waiver of immunity applies only to testimony of a public officer before a grand jury and concerning the conduct of his office or the performance of official duties. It does not refer to a public officer called to testify before a grand jury concerning the acts of any other persons; *it does not apply in any wise to legislative investigations* or to those directed by the Governor or the courts." (Emphasis ours.)

Section 903 of the Charter, it will be remembered, provides for dismissal of an officer or civil servant who re-

fuses to waive immunity or to answer questions in an inquiry before "*any legislative committee* or any officer, board or body authorized to conduct any hearing."

The express inclusion of the single proviso or exception to the right granted by the Constitution bars any other exception or qualification. That canon of interpretation (New York Statutory Construction Law, Sections 211, 212, 213 and 240) applies with greater force in the construction of constitutional provisions, for the language of the constitution is presumed to be selected with greater care and exactness. RULES OF CONSTITUTIONAL INTERPRETATION, Section 7; *Matter of Wendell* v. *Lavin*, 246 N. Y. 115; *People ex rel. Gilbert* v. *Wemple*, 125 N. Y. 485. Under that rule Article I, Section 6 of the Constitution must be held to prohibit the enactment of any law providing for punishment or discharge from office of any person because of refusal to testify on the grounds of self-incrimination, in any inquiry other than the one specified, viz: an inquiry before a grand jury. However, we shall not rest on a rule of interpretation. As shall be shown, it was the stated purpose and intent of those who drafted the aforementioned proviso to Article I, Section 6 of the Constitution to preclude any statutory abridgement of the right against self-incrimination in any inquiry other than one before a grand jury.

Before January 1, 1939, the Article read:

> "nor shall he be compelled in any criminal case to be a witness against himself" (Constitution of the State of New York, 1894, Art. I, Section 6).

The proviso was added by an amendment adopted by the Constitutional Convention of 1938, and was approved by vote of the people November 8, 1938, (McKinney, Con-

stitution of the State of New York, pp. 292-293). The first draft of the proviso submitted to the Convention was very much broader than that finally adopted. At the suggestion of Mr. Justice POLETTI, the penalty therein provided, of removal from office for refusal to testify or waive immunity, was limited to inquiries relating to the official duties of the public officer questioned. New York Constitutional Convention 1938, Revised Record, vol. III, p. 2586. Thereafter the proviso was again amended, on motion of Mr. Justice MARTIN, to further limit its application to officers who refused to testify before a grand jury. Revised Record, vol. III, p. 2588, vol. IV, pp. 2599-2600. That the Convention intended by so limiting the proviso to disallow any further invasion of the constitutional right against self-incrimination is abundantly clear from the following, extracted from the minutes of the Convention:

New York Constitutional Convention 1938, Revised Record, vol. III, p. 2586:

"Mr. Poletti: . . . the committee gave very careful study to this matter. In fact it amended the proposal of Mr. Halpern in several respects; in one respect a very important change, and I think we should note it here. This proposal is directed to public officers, that is, it intends to set them aside and treat them specially, but it deals with public officials only with respect to their official duties. It does not relate to non-official duties. . . ."

p. 2588:

"Mr. Martin: I offer an amendment as follows: on line 6, after the word 'answer' insert 'before a grand jury.' Then a public official is protected; otherwise he is not protected. I have seen investigations when I was district attorney, which were nothing but political, and where they attempted to make

officials testify before committees, and where those officials were just being bullyragged before the committee. Put him before a grand jury. He has no counsel there and he is protected before the grand jury. . . ."

p. 2589:

"Mr. Martin: . . . Before the grand jury he would be protected. We would not have the newspapers putting in the part of his testimony they liked and leaving out the part that was favorable to him. This will be a general protection to the people and will be a general protection to the public official, and would be in the interest of justice."

p. 2590:

"Mr. Martin: My first amendment is the substantial one. It goes right to the core of the question. Public officials should not be bullyragged by opposing partisans or someone who has a grudge against them, but at the same time they should not be excused; they should go before a grand jury and testify. As far as I am concerned, my amendment is intended to protect the public official, and to assure all that he is not the prey of anybody who has a grudge against him."

p. 2592:

"Mr. Halpern: My objection to Judge Martin's amendment is it prevents the application of this salutary and very important principle to legislative investigations."

* * * * * *

"Mr. Martin: . . . As the law is today, they are not compelled to answer before anybody, and they are not compelled to testify. We are broadening the law, but in our effort to broaden the law, we should not

destroy the whole body of criminal law by making a public official take the stand in a case or resign from his office, and *we should protect him the same as we protect every other citizen.* . . . ." (Emphasis ours.)

Vol. IV, p. 2597:

"Mr. Martin: If you are going to forfeit the office of every public official who feels that he is being tried before some committee, even before a Governor, for political reasons, then public officers are certainly in a bad position in this State. I think if we limit it right to the grand jury, we will have accomplished justice to all.

p. 2599:

"Mr. Martin: I do not believe in allowing investigation when the investigator will first send for the newspapers, and then when the public official comes in, try to crucify him. No matter whether he is a Republican, a Democrat, or a Communist, it makes no difference to me, I think that public official should be protected the same as any other citizen and should not be abused by these so-called investigations, many of which are going on today throughout this whole country, and are for no other purpose than to annoy the public officials.

I say this amendment would stop all that and protect everyone involved."

It is evident from the foregoing that Article I, Section 6 of the New York constitution was designed to protect public officials as well as all other citizens from loss of office or other punishment because of refusal to testify about political affiliation, before legislative committees. The reasons the constitutional amendment was so drawn are explicitly and forcefully set forth in the quoted statements, and further comment would be unwarranted.

Conclusion

Section 903 was here applied to warrant the dismissal of Professor Slochower for refusing to answer questions relating to his political affiliation in 1940 and 1941, in an inquiry conducted by a legislative committee. The section itself did not authorize the action taken. Moreover, Section 903, and the Respondent's application of the section offend the provisions, purpose and spirit of the State Constitution.

The order dismissing the petition of the appellant Slochower should be reversed, and the prayer of the petition granted.

Respectfully submitted,

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